No. 77-193

In the Supreme Court of the United States

OCTOBER TERM, 1977

HOMER R. ADCOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of his conviction in this criminal tax case on the ground that he was prejudiced by the admission of evidence of offenses similar to those alleged in the indictment.

After a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on two counts of extorting money, in violation of the Hobbs Act, 18 U.S.C. 1951, three counts of willfully attempting to evade income taxes for the years 1969, 1970, and 1971, in violation of 26 U.S.C. 7201, and three counts of filing false income tax returns for the same years, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to concurrent terms of three years' imprisonment on each of the eight counts; he was fined a total of

$20,000 (Pet. App. A1-A2). The court of appeals affirmed, with one judge dissenting (Pet. App. A1-A17).

Petitioner was a member of the Iowa Liquor Control Commission from 1959 through 1971, where he served as chairman from July 1, 1961, to July 1, 1967, and from July 1, 1969, to July 1, 1971 (Pet. App. A2). The Commission maintained a monopoly on the retail sale of wines and liquors in Iowa, and companies desiring to market their wines and liquors were required to obtain a "listing" from the Commission (*ibid.*). Mario Perelli-Minetti, general manager of the California Wine Association, testified that each year from 1965 through 1971 he paid petitioner $20,000 in cash (Pet. App. A2-A3). Petitioner did not report these amounts on his income tax returns for 1969, 1970, or 1971. Numerous documents tending to corroborate Perelli-Minetti's testimony were admitted in evidence (Pet. App. A3). Clair Fischell, a representative of various liquor companies, testified that during the years 1970 and 1971 he made three $500 payments to petitioner (Pet. App. A5, n. 4). Petitioner testified and denied receiving money from Perelli-Minetti, Fischell, or anyone else (Pet. App. A3).

Another liquor company representative, Linwood Pedrick, testified that he had made payments to petitioner of $200 in cash each month during a two-year period between 1965 and 1967, similar to those made by Perelli-Minetti and Fischell during the prosecution years (Pet. App. A5). Raymond Sibbert, another liquor company representative, testified that he paid petitioner a total of $5,000 in cash from 1962 through 1967 (*ibid.*). It was undisputed that none of these payments was reported on petitioner's tax returns.

1. Petitioner argues (Pet. 6-13) that the trial court erred in admitting the testimony of Pedrick and Sibbert

that they made cash payments to him in years prior to the prosecution years. Relying on Rule 404(b), Federal Rules of Evidence (see Pet. App. A24-A25), petitioner claims that this testimony was inadmissible either as proof of intent or as evidence of a common plan or scheme.

But in each instance, the trial court gave a cautionary instruction to the jury that the petitioner was on trial only for those acts charged in the indictment and that the evidence was admissible only to shed light on possible motive or intent, or the possible existence of a scheme or plan in terms of the crimes charged in the indictment (Pet. App. A4-A6). Although petitioner urges that the issue of intent was never raised and therefore the court erred in admitting evidence of his intent, the court of appeals correctly stated that since "intent was an essential element of each of the crimes charged" (Pet. App. A6), the government was "duty-bound in its case-in-chief to establish all of the essential elements of the crimes charged" (*ibid.*). "[I]ntent in virtually all offenses is material, and is therefore a part of the case to be proved in chief; * * * unless the precise defense be disclosed in advance, the prosecution may in fairness assume that intent may come into issue." II Wigmore, *Evidence*, § 307 (3d ed., 1940). The government therefore was not required to await petitioner's denial of intent before offering evidence of similar acts. *United States* v. *Conley*, 523 F. 2d 650, 654 (C.A. 8), certiorari denied, 424 U.S. 920; *United States* v. *Mastrototaro*, 455 F. 2d 802 (C.A. 4). Accordingly, the evidence of petitioner's similar conduct was admissible to show a pattern of unreported income prior to the prosecution years (*United States* v. *Berzinski*, 529 F. 2d 590, 593 (C.A. 8); *Amos* v. *United States*, 496 F. 2d 1269, 1273-1274 (C.A. 8)) and to show motive and intent with respect to the counts charging violation of the Hobbs Act. *United*

States v. *Kenny*, 462 F. 2d 1205, 1224 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States*, 409 U.S. 914; *United States* v. *Braasch*, 505 F. 2d 139, 149 (C.A. 7).

Contrary to petitioner's argument (Pet. 12-13), the decision below does not conflict with *United States* v. *Goodwin*, 492 F. 2d 1141 (C.A. 5). There, the defendant was charged with importing marijuana and with conspiracy to do so and the prosecution introduced evidence of a similar offense committed many months after the crimes charged in the indictment. Although the court recognized that evidence of the commission of a separate crime was admissible to show intent or a design or plan, it held that in the circumstances of that case the evidence of an isolated incident far removed in time from the indictment was prejudicial because of "the total absence of need for * * * [such] evidence" (492 F. 2d at 1152). Here, however, the evidence showed a pattern of identical conduct prior and proximate to the prosecution years. Such evidence tended to prove the existence of a common plan or scheme (see Pet. App. A2-A3, A5) and therefore was admissible.[1]

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[1] *United States* v. *Fierson*, 419 F. 2d 1020 (C.A. 7), *United States* v. *Miller*, 508 F. 2d 444 (C.A. 7), and *United States* v. *Ring*, 513 F. 2d 1001 (C.A. 6), upon which petitioner relies (Pet. 8-9), likewise are distinguishable. Those cases involved evidence of prior similar crimes (falsely pretending to be an FBI agent, interstate transportation of stolen vehicles, and mailing threatening letters) in which the prior offenses were wholly independent and separate events from those charged in the indictments. Here, however, the evidence of petitioner's prior extortion of cash payments from liquor company representatives showed a common plan or scheme.

2. Petitioner argues (Pet. 13-15) that the testimony of the witnesses Karkule[2] and Pedrick[3] was improperly admitted as an exception to the hearsay rule because it did not show the state of mind of the extortion victims (see Rule 803(3), Federal Rules of Evidence). The testimony of Karkule can be interpreted as reflecting the bitterness of Perelli-Minetti over the large amount of extortion money petitioner required him to pay each year.[4] The reasonable inference to be drawn from Pedrick's testimony is that Coates, like Pedrick, recognized

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[2] Karkule testified (Pet. 13-14) that he had the following conversation with Mario Perelli-Minetti:

> We were going to lunch in my car, and Mr. Minetti mentioned, "I see you are in Iowa now", and I acknowledged that we were, and he said, "How did you get in there?" I told him that we had purchased 12 existing brands and that when the inventory on those brands were depleted we would put our labels in place of it. His remark was, "Gee, that seems like an easy way to get in."
>
> I knew he was in Iowa, and I asked him how he got into Iowa, and he said "The hard way", or words to that effect. I asked him what it cost, and my best recollection is that he said 20 or 25 thousand and there was no further discussion.
>
> Q. Was there any discussion as to the number of payments Mr. Minetti had made?
>
> A. Yes. I made a remark—You are right. I made a remark where I said, "Well, that didn't seem too bad, because it cost that much or more to market a brand in any state", and he remarked with, "Well, that's every year."

[3] Pedrick testified (Pet. 14) that "* * * my predecessor [Coates] informed me that this was going on, and at his retirement in July of 1965, I continued the arrangement that had been previously made, and the payments continued until July of 1967."

[4] Karkule's testimony as to Perelli-Minetti's statements to him regarding the payments to petitioner was also admissible to rebut a charge of recent fabrication. See Rule 801(d)(1)(B), Federal Rules of Evidence.

that the extortion payments to petitioner were necessary in order to obtain a "listing" from the Commission for their products. The testimony therefore was admissible. *United States* v. *Biondo*, 483 F. 2d 635, 643 (C.A. 8), certiorari denied, 415 U.S. 947; *Nick* v. *United States*, 122 F. 2d 660, 670-673 (C.A. 8).

3. Petitioner also contends (Pet. 15-17) that the trial court erred in admitting evidence that petitioner received some $163,000 from liquor companies the first year after he left the Commission. As the court of appeals pointed out (Pet. App. A7), petitioner opened the door to this testimony when he testified that he "represented a few distilleries" after leaving the Commission. See *United States* v. *Sparrow*, 470 F. 2d 885, 888 (C.A. 10), certiorari denied, 411 U.S. 936. Contrary to petitioner's argument (Pet. 17), the testimony did not invite the jury to speculate that "he must have been receiving that much money" during the prosecution years. However, as the court of appeals pointed out (Pet. App. A7), this evidence did tend to corroborate testimony by Perelli-Minetti that petitioner told him, "I can do just about as much for you outside the Commission as I could inside the Commission." The trial court therefore did not abuse its discretion in admitting the disputed testimony. Cf. *Sears* v. *United States*, 490 F. 2d 150, 152-153 (C.A. 8), certiorari denied, 417 U.S. 949.

4. Finally, petitioner argues (Pet. 18-20) that the trial court deprived him of pretrial discovery. But the court of appeals found that "the government informed the defendant of the sources of unreported income, both during the prosecution and pre-prosecution years" (Pet. App. A14), and that "the government furnished appellant a vast amount of material requested by him in his Rule

16(a), Fed. R. Crim. P., motion for discovery and inspection" (Pet. App. A15). As for the complaint (Pet. 18) that petitioner was denied the right to take pretrial depositions under Rule 15(a), Fed. R. Crim. P., it is the function of that Rule, as the court of appeals pointed out (Pet. App. A15), to preserve evidence for use at trial and not to provide a method of pretrial discovery. See 8 Moore's *Federal Practice*, para. 15.01(3), p. 15-8 (1977); *United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont.).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.